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Public liability: A plea for facts*

Since the beginning of 2002, the Australian media have bombarded us with tales of a public liability 'crisis'. Early in September, the federal government released the first report of a panel it established to review the law of negligence (the 'Ipp Report')[1] while on the following day the New South Wales Government released a consultation draft of the *Civil Liability Amendment (Personal Responsibility) Bill* 2002 (NSW). Broadly the recommendations contained in the Ipp Report and the provisions of the NSW Bill aim to limit the circumstances in which people who are injured through negligence can recover compensation. While the details of any actual legislative change are not final at the time of writing, my purpose in the context of this forum is to discuss the framework within which debate around the so called 'crisis' has been taking place.

Ever since Joe Hockey, the federal Minister for Small Business and Tourism, first raised this issue early in 2002,[2] what has struck me as singularly notable is the absence from the debate of *actual data* about the extent to which the tort system does (or does not) respond to people who experience accidents and injuries. The media and political commentary has focused on individual anecdotes and horror stories designed to demonstrate our supposed increasing litigiousness and avoidance of 'personal responsibility'. We hear much about how we are becoming a 'blame' society, but rarely are we also told, at least by the media who have helped to fuel the 'crisis' environment, that as the law now stands, a person who has been injured has to find someone to blame before they can receive any compensation. The compensation system involves, very simply, the person whose negligence caused an injury being required to compensate the accident victim, on a once-and-for-all basis, for all past, present and future loss. Not surprisingly, only a tiny fraction of people injured in accidents are compensated. The rest are left to rely on the resources either of their families or of the social security system.

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Who Gets Injured and Who Gets Compensation?

In the most recent edition of their comprehensive casebook,[3] Harold Luntz and David Hambly begin their discussion of tort law by locating it within an empirical framework drawing upon a diverse range of sources to illustrate the landscape of injury, disease, incapacity and compensation in Australia.

Drawing on hospital admissions information, Luntz and Hambly show that by far the largest proportion of injuries happen in the home, where there is rarely anyone that can be sued. Only a small proportion of injuries occur on the roads, but these accidents have the most severe consequences for the person injured.

Data from the Australian Bureau of Statistics' *Survey of Disability* shows that over 30% of accidents causing disability lasting six months or more were caused by road accidents. By contrast, only 13% of accidents causing long term disability resulted from injuries that took place at home.

Road accident victims are far more likely to make claims and receive compensation than any other group.[4] Seventy five per cent of claims finalised in the NSW District Court over a survey period in 1994 were associated with motor vehicle accidents (MVAs). Yet, only about 54% of people injured in MVAs receive any compensation.[5] Few common law claims are made for workplace injuries, compared to under the statutory workers' compensation scheme. In addition, accidents and injuries other than those at work or on the roads comprise only a very small proportion of tort claims in any year.

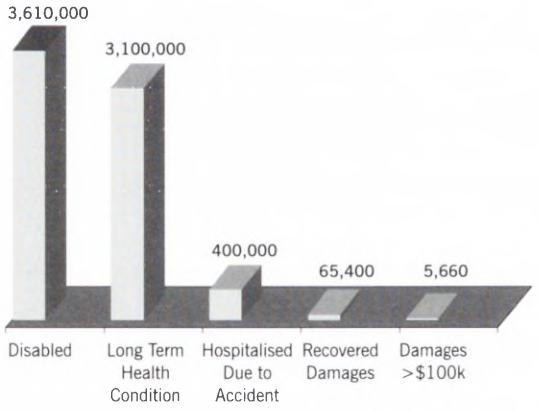
Are Damages Awards 'Too High'?

According to the first Ipp Report, there is a widely held view in the Australian community that '[d]amages awards in personal injuries cases are frequently too high'[6] (and note that the committee said it was not their job to test the accuracy of these perceptions, but rather to take them as a starting point).[7] In NSW, large claims leading to awards or settlements of over $500,000 under the third party motor vehicle insurance system averaged 115 per year between 1989 and 1996.[8] For 1997, of all claims (by type of insurance), 128 were for over $1 million of which the vast majority (89) were MVAs.[9]

Type of Insurance	Size of Lump Sum			Total Number	Total Amount $m
	$1m	$500k-$1m	$100k-$500k		
Motor Accident	89	164	2455	2708	800
Workers Compensation	12	79	2128	2219	506
Public Liability	18	33	501	552	163
Medical Indemnity	9	13	158	180	60
Total	128	289	5242	5659	1529

Coopers & Lybrand, *Structured Settlements - Legislative Project*, 6 November 1997, as cited in a report by JR Cumpston to the Structured Settlement Group, dated February 2000 as reproduced in H Luntz and D Hambly *Torts: Cases & Commentary*, 5th ed, LexisNexis Butterworths 2002, p. 10.

There are about 3.6 million people in Australia with some form of disability, however only 590,000 (16%) attribute their condition to some form of accident or injury.[10] Only 65,400 recovered damages and of those only 5660 received more than $100,000.[11]



ABS, *Disability, Ageing and Carers 1998: Summary of Findings (Reissue)*, ABS, Canberra, Cat no 4430.0, 1999, p. 7 and Table 11 as reproduced in H Luntz and D Hambly *Torts: Cases & Commentary*, 5th ed, LexisNexis Butterworths 2002, p. 11.

So Why The Sudden Need To Change The Law?

It seems clear that there is an insurance crisis of some kind that appears to have followed on from the events of 11 September 2001, and the collapse of Australian insurance giant HIH. Despite these recent critical events, there is an assumption in the public discussion, in aspects of the New South Wales proposals, and in the Ipp Reports, that the premium increases are causally related to a flood of claims and increasingly large damages awards.

In the past year, premiums for small community/voluntary organisations, local government councils and small businesses have risen exponentially and in some cases insurance has been difficult (or impossible) to obtain. Yet a survey of 700 community organisations undertaken in March 2002 by a national umbrella group, ourcommunity.com.au, found that 96% had not had a claim on their public liability insurance in the past five years. Of those groups who did have a claim, the total money paid out by insurers represented just 3.5% of the total premiums paid over one year. The average claim was $8,875 with only two groups reporting that they had claims of over $50,000.[12]

In its September 2002 report, the 'Neave committee' on medical indemnity issues [13] was careful to acknowledge that there really is insufficient data to blame litigation for the insurance crisis. The committee noted that the lack of hard data was 'a substantial barrier to national policy making'[14] and had led to 'some simplistic conclusions about the connection between premium rises and rises in claims frequency ... not necessarily strongly supported by the existing evidence.'[15]

Two key conclusions can be drawn:

- The vast majority of people who experience injury or disability are unable to recover compensation from anyone/anywhere.
- Insurance premiums have indeed risen substantially, but there is no actual evidence that this is linked to tort claims or to our becoming an increasingly litigious or 'blame' society.

Proceed With Caution

I want to conclude with a plea that we slow down and give this issue some careful thought. We could start by refraining from the use of the word 'reform' when what we actually mean is 'cuts'. Each of the statutory changes to tort law over the past twenty years or so has really been about reducing the amount of damages possible in one category or other. As the Neave report on medical indemnity points out:

'Many changes which are suggested as so-called tort reforms are simply benefit reductions, which if not well-considered will have the effect of increasing the harm and disadvantage suffered by those people who are most in need of assistance. Cost containment is an appropriate aim for reform. However the ... basis for changes [*must be*] justified by the evidence.'[16]

A real and effective reform exercise would start by gathering empirical data that supports the existence of a problem that needs 'reform'. If, as the Neave report and the ACCC suggest, there is no clearly established causal link between the insurance pricing crisis and an increase in claims (or their magnitude), reducing the damages available to the small proportion who have someone to sue will not resolve the premium crisis. Instead it will simply exacerbate the difficulties experienced by those who have suffered an injury (and those who care for them) while putting on hold, or sending off to the too hard basket, the pricing issues.

To give just one illustration of this type of statutory 'reform' in cases involving serious injury, one of the two big ticket items is damages for the costs of care. In 1977, the High Court acknowledged that the work of caring for accident victims is often left to family members, and as Sir Ninian Stephen pointed out, this care is almost invariably provided by women.[17] In *Griffiths v Kerkemeyer,* the court held that the costs of that care were recoverable by the accident victim, even where the care was being provided at no actual financial cost to the plaintiff. Yet almost

immediately following that decision, courts and legislatures started making cuts to those kinds of damages, working on the theory that the families would have no choice but to pick up that care themselves.

As for statutory caps being placed on non-pecuniary loss, this is more a rhetorical gesture than a real cut when the cap is set as an amount of $350,000 (and indexed)[18] since awards would rarely if ever reach that size. Perhaps of more interest is the fact that while damages for non-economic losses for personal injury have been capped, there is currently no statutory cap on the amount that can be awarded for such losses in defamation law.

In closing, we need to find a way to stop the media depicting tort actions as some kind of lottery in which anyone can receive a large payout and where egregious tales of plaintiff excess and rapacious lawyer greed always make a good primetime story (though of course when the appeal happens, it's nowhere near as interesting and therefore may not get any airtime). PL

Footnotes:

* This paper was presented at a forum to discuss the *Civil Liability Amendment (Personal Responsibility) Bill* 2002 (NSW) held at Parliament House (NSW) on 23 September 2002 and reflects developments to that date. Parts of this paper have been published in the UNSW Law Journal Forum (Volume 25, Number 3, 2002) and are reproduced with permission of that journal.

1 Since this paper was written the Ipp Panel has released its final report: Hon D Ipp, P Cane, D Sheldon and I Macintosh, *Review of the Law of Negligence: Final Report*, 2002.

2 See 'Crackdown on injury payouts', *Australian Financial Review*, 21 January 2002, p. 1.

3 *Torts: Cases and Commentary*, 5th ed, Butterworth, 2002.

4 ibid., para 1.1.9 citing M Delaney, 'Some Characteristics of personal injury claims in the New South Wales District Court' (Sept 1995) No. 8 *Civil Issues* (Bulletin of the Civil Justice Research Centre) 1.

5 Luntz and Hambly, op cit., fn 23, p. 8 citing Delany, above n 7.

6 Ipp Committee, *Review of the Law of Negligence: Report*, August 2002, para 1.4.

7 ibid., para 1.6.

8 Luntz and Hambly, op cit., para 1.1.10, citing the Motor Accidents Authority of NSW, *NSW Motor Accidents Scheme Large Claims*, 1997.

9 ibid., table p. 10.

10 ABS, *Disability, Ageing and Carers 1998: Summary of Findings*, Cat No 4430.0 1999, p. 7.

11 ibid.

12 ourcommunity.com.au media release, 'Are community groups getting ripped off on public liability insurance?' 25 March 2002.

13 AHMAC Legal Process Reform Group, *Responding to the Medical Indemnity Crisis: An Integrated Reform Package*, Chaired by Professor Marcia Neave AO, 2002.

14 ibid., para 3.1.

15 ibid., para 3.5.

16 AHMAC Legal Process Reform Group, op cit., para 2.9.

17 *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 170-171.

18 *Civil Liability Act 2001*, s16(2).